

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**CRIMINAL APPEAL No. 349 of 2004****For Approval and Signature:****HONOURABLE MR.JUSTICE ANIL R. DAVE :****HONOURABLE MR.JUSTICE KS JHAVERI :**

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1 Whether Reporters of Local Papers may be allowed
to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy
of the judgment ?

4 Whether this case involves a substantial question
of law as to the interpretation of the
constitution of India, 1950 or any order made
thereunder ?

5 Whether it is to be circulated to the civil judge
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AKSHAYKUMAR ALIAS CHAKO NATVARBHAI PANCHAL - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :

THROUGH JAIL for Appellant(s) : 1, MS SADHNA SAGAR for Appellant(s) :
1,
MR K.T. DAVE ASST. PUBLIC PROSECUTOR for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE ANIL R. DAVE**and****HONOURABLE MR.JUSTICE KS JHAVERI****Date : 17/04/2007****ORAL JUDGMENT**

(Per : HONOURABLE MR.JUSTICE KS JHAVERI)

1. The appellant came to be tried for the offence of kidnapping / abduction and rape of a minor by the City Sessions Court No. 14 at Ahmedabad in Sessions Case No. 261 of 2002. He was convicted for the offence of kidnapping / abduction under Section 363 and 366 of the Indian Penal Code, 1860 (for short, “the IPC”) and sentenced to undergo simple imprisonment for a period of two years. For the offence of rape, he was convicted under Section 376 and sentenced to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs.2,000/- (Rupees Two Thousand only) and in default, to undergo simple imprisonment for two months. Both the sentences were ordered to run concurrently and he was also given the benefit of set-off.

2.0 The facts of the prosecution case are that the victim was residing with her family in Amraiwadi area of Ahmedabad City. On 16.05.2002, while the father and the elder brother of the victim returned home from their daily work at around 8.00 pm, they were informed by the mother of the victim that the victim has gone out of the house at around 6.00 pm and that since then she is not

traceable. The mother of the victim inquired in the vicinity and with their relatives about the whereabouts of the victim. However, the victim was not traceable.

2.1 In the vicinity of their house, at an earlier point of time, one Natubhai Panchal was residing along with his family and it was heard by the family of the victim that the son of said Natubhai Panchal i.e. the appellant herein, had love affairs with the victim. After vacating their house in the Amraiwadi area, the family of said Natubhai Panchal had shifted to Khodiyarnagar area of Ahmedabad City. Therefore, the mother of the victim inquired about the whereabouts of the victim at the place of residence of the appellant in Khodiyarnagar area. However, neither the victim nor the appellant were found at the said place. Since the victim as well as the appellant were not traceable, the father of the victim filed an FIR with Amraiwadi Police Station on 24.05.2002 against the appellant for the offence punishable u/s. 363, 366 & 376 of the IPC.

2.2 It is alleged that on 16.05.2002 the appellant after kidnapping and enticing the victim that he would marry her, took away the victim from the local guardianship of her parents and

thereafter, repeatedly committed rape on her. Investigation was carried out on the said FIR. The appellant – accused came to be arrested on 13th August, 2002. As the Investigating Officer found sufficient material against the appellant, he filed charge-sheet in the Court of learned Metropolitan Magistrate, Court No. 7, Ahmedabad who, in turn, committed the case to the Court of Sessions and Sessions Case No. 261 of 2002 came to be registered.

2.3 The Sessions Court, on basis of the evidence led by the prosecution, concluded that the prosecution was successful in establishing the charges against the appellant and recorded conviction and passed sentence, as stated in earlier part of this judgment.

3.0 Learned Advocate Ms. Sadhna Sagar has taken us through the entire record and proceedings and has, in all fairness, conceded to the fact that it is not possible for her to assail the judgment on conviction for the offence u/s. 363 and 366 of the IPC. She has, however, submitted that if the entire evidence on record is seen, it is clear that the prosecution has completely failed to prove that the victim was born on 28.11.1987. She has submitted that

there is no evidence on record to establish the actual date of birth of the victim, except the Certificate produced at exhibit 23, which cannot be said to be a Certificate of date of birth. Hence, the date of birth cannot be said to have been proved beyond reasonable doubt and, therefore, the conviction u/s. 376 of IPC is required to be set aside.

3.1 Learned Advocate submitted that in her deposition, the victim has also admitted the fact that she had not made any complaint to her parents regarding the alleged kidnapping or rape by the appellant – accused and that the act was done at her own will and consent. Learned Advocate has, therefore, submitted that in view of the aforesaid facts, the factum of rape is not proved and, hence, the appellant may be granted the benefit of doubt.

3.2 Learned Advocate has relied upon a decision of the Apex Court in the case of *Bharwada Bhoginbhai Hirjibhai v. State of Gujarat* reported in *A.I.R. 1983 S.C. 753* wherein it has been held that in view of the provisions of Section 376 r/w. s. 511 of the IPC, the Court may take a lenient view by reducing the substantive sentence imposed for conviction u/s. 376 of the IPC.

3.3 Similar view has been adopted by the Apex Court in the case of *Prem Chand & anr. v. State of Haryana* reported in *A.I.R. 1989 S.C. 937* and *Jarnail Singh v. State of Punjab* reported in *(1998) 8 S.C.C. 629*. Learned Advocate has submitted that considering the facts and circumstances of the case and the family background of the applicant, even if the factum of rape is proved against the applicant – accused, then the Court can take a lenient view by reducing the substantive sentence imposed by the trial Court.

4. Learned APP Shri K. T. Dave has submitted that at the time of incident, the victim was a minor of 14 years and 6 months. He has submitted that the depositions of the father of the victim PW-1 at exhibit 15, mother of the victim PW-3 at exhibit 18, uncle of the victim PW-4 at exhibit 19, victim herself PW-2 at exhibit 17, the Principal of the school where the victim had studied PW-5 at exhibit 22 and the Certificate at exhibit 23, clearly establish that there is no room for doubt that the victim was more than 16 years of age at the relevant point of time. He has submitted that in fact the prosecution has proved beyond reasonable doubt the date of birth

of the victim and, therefore, rape as alleged is said to have been proved. He has, therefore, requested that this Court may not interfere with the impugned judgment and order passed by the trial Court convicting the appellant – accused for the alleged offences.

5. We have heard learned counsel for the parties and have perused the record and proceedings. We find that the evidence led by the prosecution in the form of depositions of the father of the victim PW-1 at exhibit 15, mother of the victim PW-3 at exhibit 18 and uncle of the victim PW-4 at exhibit 19, clearly indicate the involvement of the appellant – accused in the offence punishable u/s. 363 and 366 of the IPC. The deposition of the victim herself PW-2 at exhibit 17 also establish the involvement of the appellant in the said offence, considering the manner in which the same was committed. We are, therefore, satisfied that the learned Advocate for the appellant is justified in not assailing the judgment on conviction u/s. 363 & 366 of IPC and, therefore, we confirm the same.

6.0 It is not in dispute that no birth certificate of the victim is produced on record and that no witness, including the father of

the victim, has admitted that the date of birth was recorded in any Register maintained under the Statute. In the complaint, the father of the victim PW-1 has stated that her daughter was of 14 years and 6 months. In his deposition also at exhibit 15, he has stated that though the birth was not registered but, her daughter was born on 28.11.1987. If the said date is accepted to be the actual date of birth, then the father of the victim has fairly supported the say given in the complaint. The mother of the victim PW-3 at exhibit 18 has deposed that her daughter was of 14 years and 3 months and in her cross-examination, she has specifically denied that her daughter was of 18 years. The uncle of the victim PW-4 at exhibit 19 has also deposed that she was below 16 years of age. The victim herself was examined as PW-2 at exhibit 17. In her deposition, she has stated that she is of 15 years of age and in her chief-examination, in Para-4, she has stated that she was born on 28.11.1987.

6.1 PW-5 was working as the Principal of Amraiwadi Hindi School No. 1, Ahmedabad at the time when the victim was a student in the said School. The said prosecution witness has deposed at exhibit 22 that in the records maintained by the School, at entry No. 8652, the details of the victim are available wherein,

the date of birth of the victim is shown as 28.11.1987. The said prosecution witness has also issued a Certificate vide exhibit 23 dated 16.08.2002 certifying that the victim was a former student of the School and that as per the records of the School, she was born on 28.11.1987 vide entry No. 8652.

6.2 We do not find any reasons to disbelieve the deposition given by PW-5 at exhibit 22. The deposition of PW-5 at exhibit 22 and the Certificate at exhibit 23 clearly corroborate the averments made in the complaint with respect to the age of the victim as well as the depositions of the father of the victim PW-1 at exhibit 15, mother of the victim PW-3 at exhibit 18 and the uncle of the victim PW-4 at exhibit 19. In view of the above discussion, it has to be concluded that the prosecution has proved beyond reasonable doubt that the victim was below the age of 16 years at the relevant point of time.

7. Section 375 of IPC defines Rape. As per the said Section, a person is said to have committed “rape” who, except in the case of sexual intercourse with his own wife, not being under fifteen years of age, has sexual intercourse with a woman under the

circumstances falling under any of the six descriptions provided therein. As per the description given in clause six of said Section 375, “rape” is said to have been committed if the victim is under the age of 16 years whether the act was with or without her consent. Thus, even if the victim admits that the act was performed at her will and consent, then also the ingredients of Section 375 would be attracted. The Court, in such circumstances, does not have to look into as to whether the act was done with or without the consent or will of the victim, if the victim at that time was below 16 years of age.

8. In the present case, it is clearly established that the victim was below 16 years of age at the relevant point of time. Therefore, in view of the provisions of Section 375 of IPC, offence u/s. 376 of the IPC would be said to have been committed even if the victim deposes that the act was performed at her own will and consent. From the deposition of the victim herself, it is evident that the act was done against her will or consent.

9. The medical evidence on record also supports the case of the prosecution. The documents at exhibits 21 & 28 are the

Medical Certificates of the victim issued by the Civil Hospital at Ahmedabad. The document at exhibit 29 is the Medical Certificate of the appellant – accused issued by the Civil Hospital at Ahmedabad. From the said documents, it transpires that the age of the victim was between 15 – 16 years and that the offence u/s. 376 has taken place. From the above discussion and the medical evidence on record, it could be concluded that the trial Court was completely justified in convicting the appellant – accused u/s. 376 of IPC.

10.0 Coming to the question of sentence for the offence punishable u/s. 376 of IPC, the trial Court has awarded rigorous imprisonment for a period of ten years. The punishment prescribed under Section 376 of IPC is imprisonment of either description for a term which shall not be less than seven years but, which may be for life or for a term which may extend to ten years and shall also be liable to fine.

10.1 From the record, it appears that the appellant had prayed for an appointed Advocate for his defence before the Sessions Court, which was granted to him and post-conviction also,

before this Court also, he preferred appeal through jail and prayed for assistance of an appointed Advocate. This speaks volumes about the financial condition of the appellant. It is required to be noted that the appellant in his further statement has deposed that about two months prior to the date of the incident, the victim had voluntarily come to the house of the appellant and that in spite of his advice that she may return to her home, she had not gone. In her cross-examination also, the victim has admitted the fact that she had stayed with the appellant for a period of about three months in the house of a person belonging to the Rabari community. The appellant had also informed the mother of the victim about the said incident and had also told her mother that she may come to his house and take the victim with her. However, at that time, the mother of the victim had informed the appellant that let the victim live with the appellant and that the family of the victim do not want to keep the victim with them. It may be noted that no such questions were put to the mother of the victim, PW-3, exhibit 18, in her cross-examination. The factum of co-habitation of the appellant and the victim for a period of about three months prior to the date of arrest of the appellant clearly shows the gross lapse on the part of the parents of the victim.

10.2 At the time of hearing of the Sessions Case on the question of punishment, the appellant has stated that he sticks to what he has stated in his further statement. Of course, we are conscious of the fact that the victim was aged around 14 years and 6 months initially when the incident occurred and, therefore, her conduct on consent part is of no consequence on the question of guilt of the appellant. But, for deciding the quantum of punishment, the aforesaid aspect is certainly relevant. The appellant and the victim have stayed together for a period of about three months. Keeping the facts and circumstances of the case in mind and the principle laid down in the cases of *Bharwada Bhoginbhai Hirjibhai, Prem Chand and Jarnail Singh* (supra) , we are of the view that ends of justice would be served if the appellant is awarded a sentence of rigorous imprisonment for a period of seven years instead of ten years as awarded by the trial Court. So far as the offence punishable u/s. 363 & 366 of the IPC are concerned, the same is upheld.

11. We, therefore, partly allow the appeal. The conviction of the appellant – accused in Sessions Case No. 261 of 2002 is upheld.

The sentence awarded to the appellant for the offence punishable u/s. 363 & 366 of the IPC is confirmed. So far as the offence punishable u/s. 376 of IPC is concerned, the appellant is ordered to undergo rigorous imprisonment for a period of **Seven Years** and to pay fine of Rs.2,000/- (Rupees Two Thousand only) and in default, to undergo simple imprisonment for two months. The said amount to be given to the victim as compensation. Both the sentences are ordered to run concurrently. The period spent in jail by the appellant to be given set-off.

[Anil R. Dave, J.] [K. S. Jhaveri, J.]

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